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No. 02-126

In the Supreme Court of the United States

RALPH E. WHITMORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish the intent element of petitioner's bank fraud convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a-42a) is not published in the *Federal Reporter*, but is reprinted at 35 Fed. Appx. 307.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2002. A petition for rehearing was denied on April 23, 2002 (Pet. App. 43-44a). The petition for a writ of certiorari was filed on July 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Alaska, petitioner was con-

victed of seven counts of bank fraud, in violation of 18 U.S.C. 1344; 13 counts of making false entries in bank books and records, in violation of 18 U.S.C. 1005; and four counts of misapplication of bank funds, in violation of 18 U.S.C. 656. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed petitioner's convictions and sentence.

1. Petitioner was the controlling shareholder, Chairman of the Board, and Chief Executive Officer of Alaska Statebank (ASB), a state chartered and federally insured bank headquartered in Anchorage, Alaska. He also owned ASB's two holding companies. As a result, he exerted considerable control over the bank's management, including decisions about the issuance of loans and dividends. Pet. App. 2a-3a, 5a; Gov't C.A. Br. 6.

a. In 1984, petitioner presented the ASB Board of Directors with a plan to acquire the Alaska National Bank of the North (ANBN) and merge it into ASB. He told the directors that ASB could not legally purchase ANBN directly, but that ASB could loan each of the directors sufficient funds to purchase ANBN stock and pay interest and expenses. Petitioner assured the directors that they would not be personally responsible for repaying the loans. Pet. App. 5a; Gov't C.A. Br. 7.

Each of the four directors received a $350,000 loan secured by ANBN stock and a $150,000 unsecured loan (the director loans). Petitioner caused the directors to sign letters falsely stating that the loans were personal investments, and that there was no agreement for the bank or its holding companies to indemnify the directors from market risk associated with ownership of the shares. Petitioner subsequently used the loan proceeds to purchase ANBN stock, and the directors

pledged control over the stock to petitioner. Pet. App. 5a; Gov't C.A. Br. 8-9.

In November 1985, when the director loans came due, the Alaskan economy had taken a downturn. No payments were made on the loans. In order to prevent the loans from appearing to be in default, petitioner directed H. Derrell Smith, the President of ASB, to instruct the bank executive responsible for the loans to roll them over and to add $100,000 to some of them. The bank executive had no information on which to base the rollovers, and she prepared only "skimpy" credit cover sheets (CL-10s), Pet. App. 6a, which she then refused to sign. The CL-10s, which were the only documentation supporting the loan rollovers, falsely listed the source of the loan repayment as "cash flow," and they did not indicate the value of the ANBN stock. Despite the fact that the loan file had no supporting information, the credit committee approved the rollovers, and minutes from the Board indicate that it approved the loans as well. Smith testified before the grand jury that petitioner "engineered" the loan rollovers so that the directors would not themselves have to repay the loans. *Ibid.*; Gov't C.A. Br. 11-12.

One of the directors refused to sign the new note, and the bank did not attempt to collect on the defaulted loan. After about a year, the director finally agreed, at Smith's urging, to sign a note that increased the unsecured loan by $50,000. No paperwork supported the new loan. Gov't C.A. Br. 13-14.

In December 1986, the loans to the other three directors were again due. The Alaskan economy had worsened, the ANBN stock that served as collateral was worthless, and the directors lacked the resources to repay the loans. Nonetheless, the loans were rolled over with $25,000 added to the principal. Petitioner

submitted the loans to the Board without documentation, and the CL-10s were created several days later. As with the first rollover, the CL-10s were fraudulent: they falsely listed the primary source of repayment as "business income," and they identified the loans' purpose as "to provide additional working capital." Pet. App. 7a; Gov't C.A. Br. 16. Because some members of the credit committee had refused to approve the loans, petitioner had Smith arrange for a special meeting of the committee on December 26, 1986, when the objecting members were not present. In his grand jury testimony, Smith stated that the second rollover had no benefit to the bank, but instead kept the loans current on the books and prevented the directors from having to pay interest from their own funds. Smith stated that petitioner forbade him from attempting to collect on the loans. Pet. App. 7a; Gov't C.A. Br. 14-16, 19.

In February 1987, the FDIC examined the bank. The examiners had several concerns about the loans, and Smith responded in writing to the FDIC, explaining ASB's loan review procedures and assuring the examiners that the director loans fully complied with those procedures. At the FDIC's second examination in January 1988, the loans were delinquent but were still listed on the bank's books as assets and accruing interest. The FDIC criticized the loans because of their preferential treatment and the bank's failure to collect them. Pet. App. 7a; Gov't C.A. Br. 17-18.

b. Petitioner also caused the bank to pay excessive dividends to the holding company that he controlled. In the early 1980s, ASB typically declared an annual dividend of approximately 25 cents per share. In 1987, when the bank was already failing, branches were closing, and expenses were being cut, petitioner caused the bank to declare quarterly dividends of $6.50 per

share, for a total of approximately $2.7 million. Pet. App. 8a; Gov't C.A. Br. 25.

Petitioner told the Board that the dividends were necessary to enable the bank's holding company to make payments on a loan from Mellon Bank, and that Mellon Bank had threatened to close ASB if the holding company failed to repay the loan. In fact, Mellon Bank had made no such threat. During the same time period, petitioner caused the holding company to issue dividends of $221,000, $90,000 of which went directly to him. Pet. App. 8a; Gov't C.A. Br. 25-26.

2. Petitioner, Smith, and the other three directors were charged in a 41-count indictment with making false entries in bank books and records, making false statements about loans, conspiracy, bank fraud, and misapplication of bank funds. The bank fraud charges involved the rollover of the director loans and the issuance of the dividends. Indictment 23-26, 31-36, 50.

The defendants moved to dismiss various counts of the indictment for failure to state an offense, and the district court granted the motion to dismiss the conspiracy count, the bank fraud counts, and the false entry counts. The district court held that the bank fraud counts involving the rollovers of the director loans were insufficient because the rollovers did not cause the bank to expend additional funds, and the bank therefore was not deprived of property. The court also held that the indictment was defective because it stated that the defendants "acted * * * with intent to deceive ordinarily in order to bring about a financial gain to [themselves] *but not necessarily to harm or cause economic loss to the bank*," and the court believed that the latter phrase negated the specific intent required under the bank fraud statute. See *United States* v. *Ely*, 142 F.3d 1113, 1117-1118 (9th Cir. 1998).

In dismissing the bank fraud counts involving the payment of the dividends, the district court acknowledged that the defendants had "systematically plundered" the assets of ASB, but the court held that those actions were not fraudulent because petitioner, as the person in control of the bank, "was * * * able to do whatever he wished," and "[e]veryone knew what was going on." *Id.* at 1118.

3. The government appealed, and the court of appeals reversed all of the dismissals, except for the dismissal of two false entry counts against one of the directors. In reinstating the bank fraud counts involving the rollovers, the court held that the indictment sufficiently alleged a property loss because it stated that the defendants had "prevented [ASB] from collecting loans and interest that were due and [had] arranged for [ASB] to create further credit in their favor which would pay the interest due." *Ely*, 142 F.3d at 1119. The court also concluded that the indictment sufficiently alleged that the defendants intentionally engaged in that conduct, and the court therefore held that the indictment adequately alleged their intent to defraud. *Ibid.* The court treated the "awkward and ungrammatical" phrasing to which the district court had objected as surplusage without "significance." *Ibid.*

The court of appeals also held that the bank fraud counts involving the dividend payouts were sufficient. The court explained that the indictment alleged that the defendants had declared the dividends "with reckless disregard for the effects the payment of these dividends would have on" ASB, and that "reckless disregard by fiduciaries of the property committed to their care" is tantamount to intent to defraud the entity owed the fiduciary duty. See 142 F.3d at 1121 (citing cases from various courts of appeals holding that "reck-

less disregard" is equivalent to intent to defraud under Section 1344 and 18 U.S.C. 656, the parallel bank theft statute applicable to bank employees).

4. Petitioner's initial trial ended in a mistrial. The jury found petitioner not guilty on one count but was unable to agree on the other counts. Pet. App. 3a.[1] In November 1999, the case was retried. *Id.* at 3a-4a. In charging the jury on bank fraud, the district court defined the elements of bank fraud as follows:

> One: [Petitioner] knowingly executed or attempted to execute a scheme or artifice:
>
> (a) to defraud Alaska Statebank of money or property as alleged in the indictment, *OR*
>
> (b) to obtain money, funds, or other property owned by or under the custody or control of Alaska Statebank by means of material false or fraudulent pretenses, representations, or promises;
>
> Two: [Petitioner] acted with intent to defraud;
>
> Three: The deposits of Alaska Statebank were insured by the Federal Deposit Insurance Corporation.

Jury Instruction No. 8.3.

The court additionally defined "intent to defraud" as follows:

> To act with "intent to defraud" means to act knowingly and with intent to deceive or cheat,

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[1] Two of the directors entered into cooperation agreements with the government before trial, and a third was a fugitive. The jury found Smith not guilty on four counts but was unable to agree on the other counts. Pet. App. 3a.

> ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to one's self. However the evidence need not establish that Alaska Statebank was actually defrauded, but only that the defendant acted with intent to defraud. An intent to defraud may be demonstrated by the scheme itself. It may also be proven by reckless disregard of the bank's interest. Similarly, the defendant's knowledge of a false statement or his reckless indifference to the truth or falsity of a statement can demonstrate an intent to defraud.

Jury Instruction 6.5. The jury found petitioner guilty of all the bank fraud charges, as well as multiple counts of making false entries and misapplying bank funds. Pet. App. 4a; Gov't C.A. Br. 5.

5. On appeal, petitioner challenged the sufficiency of the evidence on the bank fraud charges on the ground that the government did not prove that the rollover of the loans and the issuance of the dividends were part of a fraudulent scheme. Petitioner also argued that the government did not establish his specific intent to defraud the bank. Pet. C.A. Br. 10-18, 20-25, 27-32; Pet. C.A. Reply Br. 5-9, 11-15, 18-26. Petitioner did not argue that the evidence was insufficient because it failed to show his intent to expose the bank to the risk of economic loss.

The court of appeals held that the evidence was sufficient for a rational jury to find that petitioner engaged in bank fraud. Pet. App. 12a-13a. The court found that the jury could have inferred that petitioner intended to defraud ASB in rolling over the director loans because, as the "architect of the transactions," he engaged in "manipulation of bank policy" "to protect

the prior investments made by the directors." *Id.* at 12a. The court noted that petitioner accomplished the rollovers by, among other things, listing false purposes for the loans on bank documents. *Ibid.* The court also noted that the jury could have relied on Smith's testimony that the purpose of the rollovers was to shield the directors from personal liability. That purpose, the court explained, evidenced "reckless indifference to the bank's interests," which is sufficient to support a jury finding of intent to defraud. *Ibid.*

As to the bank fraud counts based on dispersal of the dividends, the court also concluded that there was ample evidence from which the jury could have inferred petitioner's intent to defraud. Pet. App. 13a. The court noted that petitioner "lied to the Board" to encourage approval of the dividend payments. *Ibid.* The court also stated that petitioner's "actions required paying out $2.7 million in dividends at a time of financial crisis for ASB" and thus evidenced "reckless disregard for the interests of the bank" sufficient to support a finding of intent to defraud. *Ibid.* Finally, the court noted that the fact that the Board had approved the dividends was not an absolute defense but was merely evidence that the jury could have "considered as part of the defense that there was * * * no intent to injure the bank." *Ibid.* (quoting *United States* v. *Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1987)). The court concluded that, because the evidence showed that petitioner "was the moving force behind the board of directors," "the jury could properly have inferred that the Board's action in approving the dividends was dictated by [petitioner] himself and was therefore insufficient to excuse [his] actions." *Ibid.* (quoting *Unruh*, 855 F.2d at 1368-1369, and *United States* v. *Salinas*, 654 F.2d 319, 328 n.12 (5th Cir. 1981)).

ARGUMENT

Petitioner contends (Pet. 10-14) that the Court should grant certiorari in this case to resolve a conflict among the courts of appeals over the scope of the bank fraud statute. Although the courts of appeals disagree on whether exposing or intending to expose a financial institution to a risk of loss is an element of bank fraud, this case is not an appropriate one to resolve that disagreement. Petitioner did not raise the question whether intent to cause a risk of economic loss is a necessary element of bank fraud in the court of appeals, and that court did not clearly resolve the issue. Moreover, there was ample evidence from which a rational jury could have found that petitioner intended to and did expose ASB to a risk of loss. There is thus sufficient evidence to support petitioner's conviction for bank fraud under the approach he advocates, as well as under that taken by any court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

The bank fraud statute makes it a crime "knowingly [to] execute[], or attempt[] to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344. The statute thus prohibits "any scheme or artifice to defraud a financial institution or to obtain money or property * * * by means of false or fraudulent pretenses, representations, or promises." *Neder* v. *United States*, 527 U.S. 1, 20-21 (1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope. See S. Rep. No. 225, 98th Cong., 1st Sess. 378-379 (1983). It has been con-

strued to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

This Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute. Nevertheless, the Court's interpretation of the analogous mail fraud statute makes clear that the essence of a bank fraud scheme is "the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). For that reason, several courts of appeals have held that the intent necessary for a bank fraud conviction "is an intent to deceive the bank in order to obtain from it money or other property." *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (1st Cir.) (en banc), cert. denied, 531 U.S. 961 (2000). See *United States* v. *McCauley*, 253 F.3d 815, 819 (5th Cir. 2001) ("The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself."); *United States* v. *LaMarre*, 248 F.3d 642, 649 (7th Cir.) ("'[s]pecific intent to defraud' means that a defendant acted wilfully and with specific intent to deceive or cheat"), cert. denied, 533 U.S. 963 (2001); *United States* v. *Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) ("[t]he bank fraud statute condemns schemes designed to deceive in order to obtain something of value").

There is some disagreement among the courts of appeals concerning the intent necessary to constitute

bank fraud in certain circumstances. The disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The majority of the courts of appeals that have addressed that issue have rejected such a requirement. See *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("to have the specific intent required for bank fraud the defendant need not have put the bank at risk of loss in the usual sense or intended to do so"), cert. denied, No. 01-9504 (Oct. 7, 2002); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001) ("we believe that 'risk of loss' is merely one way of establishing intent to defraud in bank fraud cases"), cert. denied, 122 S. Ct. 1543 (2002); *Kenrick*, 221 F.3d at 29 (intent to harm bank is not required); *United States* v. *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995) ("government need not prove that a defendant put a bank 'at risk' to sustain a conviction under section 1344(2)"), cert. denied, 516 U.S. 1082 (1996); see also *LaMarre*, 248 F.3d at 649 (requisite "intent to deceive or cheat" is "*usually* for financial gain for one's self *or* the causing of financial loss to another" (emphases added)). The Second and Fifth Circuits, however, have held that the government must prove, as an element of the offense, that the defendant intended to expose the bank to an actual or potential loss. See *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States* v. *Schnitzer*, 145 F.3d 721, 734 (5th Cir. 1998).[2]

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[2] The Fourth Circuit, in upholding a bank fraud conviction based on the negotiation of forged checks, has stated that "expos[ing]" the bank "to an actual or potential risk of loss" is a required element of bank fraud. *United States* v. *Brandon*, 298 F.3d 307,

The Ninth Circuit has not previously taken a firm position on the question. See *United States* v. *Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995) (stating that "[t]he Ninth Circuit has never adopted a 'risk of loss' analysis in bank fraud cases" and declining to decide the issue). Nor does the unpublished decision in this case provide an explicit answer to that question.[3]

Petitioner did not argue to the court of appeals that the bank fraud statute requires proof of intent to expose the bank to a risk of loss; nor did petitioner argue that the evidence was insufficient because it failed to show that petitioner had that intent. Rather, petitioner argued that the evidence was insufficient because it

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312 (4th Cir. 2002) (quoting *United States* v. *Colton*, 231 F.3d 890, 908 (4th Cir. 2000)). But that court has not, as far as the government is aware, reversed a bank fraud conviction based on lack of proof of that element.

[3] Petitioner suggests that the Ninth Circuit is "internally conflicted on the issue" and has held, in some opinions, that "intent to cause risk of economic loss is not a required element of bank fraud." Pet. 11-12. Any internal conflict within the Ninth Circuit should be resolved by that court rather than this one. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). There is, however, no internal conflict; rather, the Ninth Circuit has not yet resolved the issue. The two cases cited by petitioner (Pet. 12) do not squarely address the question. In *United States* v. *Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), cert. denied, 513 U.S. 1059 (1994), the court held that a defendant's belief that the victim will not sustain an economic loss is not a defense. A belief that the victim will not actually sustain an economic loss is not, however, equivalent to a lack of intent to expose the victim to a risk of loss. Similarly, in *United States* v. *Mason*, 902 F.2d 1434, 1442 (9th Cir. 1990), the court held that the bank fraud statute does not require proof that the bank actually incurred a loss or that the defendant intended for the bank actually to incur a loss. The court did not hold, however, that the statute does not require proof of intent to expose the bank to a risk of loss.

showed at most negligence rather than intent to deceive or to defraud. See Pet. C.A. Br. 18, 24, 31; Pet. C.A. Reply Br. 8-9, 15, 21, 23-24. The court of appeals rejected those arguments and concluded that the jury could have inferred petitioner's intent to defraud from his conduct, including his false statements and his "reckless disregard for the interests of the bank." Pet. App. 12a-13a.[4]

Although petitioner seems to assume that the court of appeals did not require any intent to cause a risk of loss to the bank, the court's opinion nowhere states that proof of intent to defraud does not require proof of intent to expose the bank to the risk of loss. To the contrary, the opinion suggests that a defendant would have a valid defense to a charge of bank fraud if he had "no intent to injure the bank." Pet. App. 13a (quoting *United States* v. *Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1987)).

Because the question whether the bank fraud statute requires proof of intent to expose the bank to a risk of loss was not pressed by petitioner, and was not clearly passed upon by the court of appeals, this Court should not address the question in the first instance. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7

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[4] Petitioner's challenge to his conviction focuses on the sufficiency of the evidence. Although the petition refers briefly (at 3) to the jury instructions, petitioner does not seek review of any purported instructional error. Nor is he in a position to do so, as his claim in the court of appeals was limited to a challenge to the sufficiency of the evidence. Pet. C.A. Br. 2, 4: Pet. C.A. Reply Br. 1. Any instructional claim would not properly be raised for the first time here.

(1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5]

Even if the court of appeals had addressed the question, this case would not be an appropriate vehicle for this Court to resolve the question because its resolution would not affect the disposition of petitioner's sufficiency challenge. There was ample evidence from which a rational jury could have found that petitioner intended to expose and did expose ASB to a risk of loss. Petitioner's direction to officers of the bank to renew the director loans even though he knew that the borrowers would not repay them, his decision to forgo any collection efforts, and his misrepresentation of the purpose of the loans and the source of repayment all placed the bank at risk. The same is true of the issuance of the dividends, which petitioner authorized while knowing that the bank was failing, that employees were being laid off, and that branches were closing. At the very

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[5] The court of appeals also did not address the risk-of-loss question in its earlier opinion reversing the dismissal of the indictment. Although the district court had held the indictment defective in part because it alleged that petitioner's intent was "not necessarily to harm or cause economic loss to the bank," the court of appeals did not decide whether that allegation was inconsistent with the required intent to defraud. Rather, the court of appeals disregarded that language as surplusage to which it "d[id] not attach significance." *Ely*, 142 F.3d at 1119. The court of appeals did hold in its earlier opinion that a fiduciary's "reckless disregard" for the bank's interests is tantamount to intent to defraud, but the question whether "reckless disregard" is tantamount to "intent" is distinct from the question whether the required intent is to expose the bank to the risk of loss. In any event, the petition does not seek this Court's review of the court of appeals' earlier ruling; rather, petitioner acknowledges (Pet. 3) that the earlier ruling "expressly avoided consideration of the 'intent to harm' issue."

least, petitioner's conduct "evidenced a reckless indifference to the bank's interests" from which a jury could rationally infer an intent to expose the bank to potential losses. Pet. App. 12a; cf. *Ely*, 142 F.3d at 1121; *Willis* v. *United States*, 87 F.3d 1004, 1007 (8th Cir. 1996); *United States* v. *Adamson*, 700 F.2d 953, 962 (5th Cir.) (en banc), cert. denied, 464 U.S. 833 (1983).

Petitioner's contention (Pet. 13) that he was not motivated to harm the bank does not negate the ample evidence that he intended to expose the bank to risk. A defendant may hope that no harm actually befalls a bank but still intentionally engage in actions that expose it to potential loss. See *United States* v. *Parekh*, 926 F.2d 402, 408 (5th Cir. 1991) (government can prove intent to injure or defraud bank by "showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive") (quoting *United States* v. *Southers*, 583 F.2d 1302, 1305 (5th Cir. 1978)). Petitioner's conduct thus falls squarely within the statute's proscription under the approach taken by any court of appeals. This case therefore presents no opportunity to resolve the question on which the courts of appeals are divided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2002